July 2, 1767.

ANSWERS

FOR

JAMES Earl of MORAY,

TO THE

PETITION of *William Mure* of *Caldwall*, Eſq; one of the Barons of his Majeſty's Court of Exchequer in *Scotland*, and of *Thomas Kennedy*, Son and Heir of the deceaſed *Francis Kennedy* of *Dunure*, and his Tutors and Curators.

THE Petition now to be anſwered reclaims againſt the Lord Ordinary's Interlocutors, therein fairly recited, in the Proceſs of Reduction and Declarator, at the Reſpondent's Inſtance, of the following Dates: 23d *January* 1765,—8th *March* 1765,—31ſt *January* 1766,—17th *July* 1766, and 5th *March* 1767, in ſo far as, by theſe Interlocutors, the Petitioners are found liable to the Reſpondent in the Coſts of Suit, and in the Expences of extracting the Decreet; and, upon a fair State of the Caſe, the Reſpondent will humbly ſubmit it to your Lordſhips, if in any Caſe Expences have been more juſtly awarded.

The Arguments pleaded in this Petition, for being free of Expences, are, that the Petitioners had a *probabilis cauſa litigandi*, that they were not *altogether* ſatisfied of the Reſpondent's having the Right of Superiority of the Lands of *Abbayhill*,

bayhill, in conſequence of his Purchaſe of the late Lord *Balmerino*'s Eſtate from the Barons of Exchequer; that it was neceſſary for their Security, and to render their Title certain, and properly made up, that there ſhould be a Judgment upon that Point, that Baron *Mure*'s taking his Charter from the Crown, was owing to an innocent Miſtake, into which he was led from the former Charter under the Great Seal, which Baron *Kennedy* had obtained of theſe Lands, to be holden of his Majeſty; that this did not proceed from any wilful Intention of arrogating a Right, which, in their Opinion, did not belong to them, and that *Francis Kennedy*, Baron *Mure*'s immediate Author, in a Repreſentation preferred to the Lord Ordinary, annexed to the Petition, had declared his Purpoſe to acquieſce how ſoon the Lord Ordinary ſhould give it as his Opinion, that the Titles had been erroneouſly made up.

How far this is a juſt Repreſentation of the Petitioners Conduct, judicial or extrajudicial, ſhall be humbly ſubmitted from the following State of Facts, from which it will appear, that the Reſpondent has been moſt improperly and unneceſſarily involved in this Litigation, attended with ſo much Expence, to obtain Redreſs of a wilful and deliberate Device, to ſtrip him of his Superiority, which he had bought at a higher Price than Things of that Nature are uſually acquired from the Publick; and as, in ſtating theſe Facts, there will be Occaſion to mention the extrajudicial Communings which paſſed between the Petitioner, Baron *Mure*, and the Reſpondent, previous to the intenting the aforeſaid Summons of Reduction and Declarator, your Lordſhips will hold theſe as ſo many undiſputed Facts, as they have all along been averred on the Part of the Reſpondent, and never once contraverted on the Part of the Petitioners.

The Lands of *Abbayhill*, Part of the Eſtate of *Balmerino*, were granted in Feu to *Archibald Hamilton*, to be held by him

of

of Lord *Balmerino*, as Superior, for Payment of 12 *l.* 4 *s.* *Scots* of Feu-duty.

These Lands were purchased at a judicial Sale, for Behoof of Colonel *William Kennedy*; but, as the Colonel happened to die soon after the Sale, the Disposition was taken in Name of the late Baron *Kennedy*, Brother and Heir of Conquest to the Colonel. Feb. 21st, 1741.

The Estate of *Balmerino* became forfeited to the Crown by Lord *Balmerino*'s Conviction for his Accession to the Rebellion 1745.

Whether Baron *Kennedy*, as Purchaser of *Abbayhill*, might have been intitled to hold these Lands *in capite* of the Crown, in virtue of the Clan-act, is immaterial, as it is an undisputed Fact, that none of the Measures, required by said Act, were taken within the Time limited to intitle the Sub-vassal to hold these Lands *in capite* of the Crown.

And therefore it follows, that, during the Time that the Estate of *Balmerino* was in the Hands of the Crown, by means of Lord *Balmerino*'s Forfeiture, whereby there was a Surcease of any intermediate Superior, it became necessary, that Baron *Kennedy* should take his Charter from the Crown, *supplendo vices*, as in place of Lord *Balmerino*.

Accordingly, of this Date, Baron *Kennedy* expede his Charter under the Great Seal, the *Quæ quidem* of which is in the following Words: " Quæ quidem terræ, &c. ad demortuum " Archibaldum Hamilton de Abbayhill, tent. per illum de " Domino Balmerino, perprius hæreditarie pertinuerunt, " &c. et quæ nunc de nobis tenentur, tanquam immediatis " earundem superioribus legitimis, *ratione forisfacturæ* Ar- " thuri Domini Balmerino nuper demortui, immediate quon- " dam superioris earundem, virtute publicorum parliamen- " ti actorum hac de re confect. tenen. &c." July 27, 1752.

And such being the Tenor of the Charter granted to Baron *Kennedy*, and such the declared Title under which the Sovereign granted that Charter *supplendo vices*, it is submitted to

to your Lordſhips, without any Argument, whether Baron *Kennedy*, or any in his Right, could from thence entertain the leaſt Doubt, that, in the after Renewal of ſaid Inveſtiture, upon the Sale of the Lord *Balmerino*'s Eſtate, comprehending, *inter alia*, the Superiority of theſe Lands of *Abbayhill*, they behoved to return to hold theſe Lands of the Purchaſer, and to pay the Feu-duties to him.

March 1, 1753. Accordingly it appears, that, in purſuance of the publick Advertiſements iſſued from the Court of Exchequer, according to the Directions of the Statute in that Behalf made, the Superiority and Feu-duty of theſe Lands of *Abbayhill* were expoſed to Sale by the Barons of Exchequer, and purchaſed by the Reſpondent at thirty Years Purchaſe of the Feu-duty, whether that was an adequate Price or not, is not material, the Superiority of theſe Lands was expreſly ſold and diſponed.

And it is material to obſerve, that though, at this Roup, *Andrew Chalmer*, Writer in *Edinburgh*, appeared and proteſted, that the Superiority belonged to Baron *Kennedy*, yet being ſoon made ſenſible how improper that Proteſtation was, he withdrew the ſame, and acquieſced in the Reſpondent's being preferred as higheſt Purchaſer at the Roup.

Feb. 4, 1755. The Barons of Exchequer did thereupon, of this Date, execute a Diſpoſition in favours of the Reſpondent, of the Superiority and Feu-duty of theſe Lands of *Abbayhill*, and of certain other Parts of the Eſtate of *Balmerino*, likeways purchaſed by the Reſpondent, whereupon the Reſpondent ex-

Feb. 24, 1755. pede his Charter under the Great Seal, and was thereupon infeft 9th *April* thereafter.

Baron *Kennedy* having died in *May* 1754, was ſucceeded in theſe Lands by his Brother *Francis*, who, for a Courſe of Years, made regular Payment to the Reſpondent of theſe Feu-duties, and thereby acknowledged the Reſpondent's Right of Superiority, of which there could not be the leaſt Doubt.

Notwithſtanding

Notwithſtanding of which it appears, that, when the ſaid *Francis Kennedy* came to eſtabliſh in his Perſon the feudal Title of theſe Lands, as Heir to his Brother the Baron, tho' he ſaw the Reſpondent's Charter under the Great Seal, and his Infeftment in this Superiority upon Record, and had paid the Feu-duty for ſo many Years to the Reſpondent, inſtead of applying to the Reſpondent for a Renewal of the Inveſtiture, he ſerved himſelf Heir-in-ſpecial in theſe Lands to his Brother the Baron, and moſt improperly retoured them as holding of the King; which Retour, as to the Holding, runs in theſe Words: " Et quod eædem tenentur in capite de dict. " S. D. N. rege, ſuiſque ſucceſſoribus, immediatis legitimis " ſuperioribus earundem, (ratione forisfacturæ Arthuri Do- " mini Balmerino, quondam immediati ſuperioris earundem) " in feudifirm. etc. pro annua ſolutione ſummæ duodecim " librarum et quatuor ſolidorum monetæ Scotiæ, etc." and concludes thus: " Vero quod feudifirmæ ſeu non introitus " divoriæ, 12 l. 4 s. monetæ Scotiæ, pro annis 1753, 1754, " 1755, 1756, 1757, 1758, et 1759, ſolutæ fuerunt Comiti " de Moray, *qui nuuc jus habet ad dictam baroniam de Reſtal-* " *rig*, quæ pertinuit dict. Domino Balmerino, uti apparent " per receptionem et exonerationem dict. divoriarum conceſ- " ſam per Jacobum Maul, factorem pro dict. Comite." Jan. 29, 1762.

This Retour was erroneous, and the Error was obviouſly wilful. *Francis Kennedy* ſaw upon Record the Reſpondent's Charter under the Great Seal, and Infeftment thereon of this Superiority, his Brother the Baron withdrew the Proteſt which had been raſhly taken at the Sale, the Articles of Roup, and the Reſpondent's Diſpoſition, was on Record in Exchequer, *Francis Kennedy* had paid the Feu-duties to the Reſpondent's Factor, for all the Years ſince his Purchaſe, down to the 1759, and the Diſcharges of theſe Feu-duties were produced at the Service.

With what Views this ſpecial Service was expede in theſe Terms the Reſpondent ſhall not pretend to ſay, further than

to obſerve, that as Baron *Mure* had then concluded a Bargain
June 25, 1762. for the Purchaſe of theſe Lands, he, of this Date, obtained a Diſpoſition from *Francis Kennedy*, and, upon the 23d *February* 1763, took out a Charter under the Great Seal.

What followed thereon merits particular Attention: The Reſpondent's Agent, having received Intelligence of the foreſaid erroneous Service and Charter, did forthwith apply both to Baron *Mure* himſelf and his Agent, repreſenting the Impropriety of what had been thus done, and that the Baron behoved to take his Entry from the Reſpondent: And as both the Baron and his Agent ſeemed then fully ſatisfied of the Impropriety of their Method of proceeding, they expreſſed it in Terms unneceſſary to repeat.

But as, notwithſtanding thereof, Baron *Mure* ſtill retained Poſſeſſion of the foreſaid erroneous Charter, and made no Advances to ſet Matters to right, the Reſpondent, as a Spur to him, gave Orders to his Agent to raiſe a Summons of Reduction and Declarator, but which the Reſpondent did thereafter ſtop, upon Baron *Mure*'s calling upon him at his Lodgings in *Edinburgh*, in the End of *March* or Beginning of *April* 1764, when, in reſpect of his being then about to ſet out for *London*, he aſked, and the Reſpondent readily granted, a Delay till the Baron ſhould return from *London*, when the Baron ſaid he would ſettle Matters with Mr. *Kennedy*, and take an Entry from the Reſpondent.

Truſting to this Promiſe, the Reſpondent delayed raiſing and executing the Summons of Reduction and Declarator, not only till the Baron returned from *London*, but during the whole Summer and Autumn 1764, during all which Time not the leaſt Advance was made on the Part of the Baron; and at length the Reſpondent was given to know the Baron's Reſolution, not to give up the Charter from the Crown, nor to take an Entry from the Reſpondent. The Summons was thereupon raiſed in *October* 1764, called
Dec. 1, 1764. and given out, and of this Date returned, with the following Defence:

Defence: " That the Charter to Baron *Kennedy*, in conſe-
" quence of the Clan-act, veſted him in the Lands as hold-
" ing of the Crown for ever, under Proteſtation to add and
" eik." How proper and becoming that Defence was, is humbly ſubmitted.

When the Proceſs came to be inſiſted in, though the Writs called for were all in the Defenders Poſſeſſion, and could inſtantly have been produced, they did not chuſe to ſatisfy the Production *inſtanter*, but craved a competent Time for that Purpoſe, whereby the Reſpondent was put to the Expence of extracting an Act, and, after the Production was ſatisfied, of applying for a Warrant to diſcuſs; which being remitted to the next Week's Ordinary in the Outer-houſe, came to be inſiſted in before the Lord *Elliock*, of this Date, when the De- Jan. 23, 1765.
fenders thought proper to abſent, and ſuffer Decreet to go in Abſence.

It is now made an Article of Complaint, that, as the Summons did contain not only a Reduction and Declarator, but alſo of Tinſel of the Property, Mails and Duties, Damages and Expences, it was improper for the Reſpondent to have taken Decreet in theſe Terms; and, therefore, that a Repreſentation on the Part of the Defenders became neceſſary. But, as it is known to your Lordſhips that ſuch is the eſtabliſhed Form and Stile of all Summonſes of that Nature, when the Vaſſal, diſclaiming his true Superior, and has taken a Charter from a wrong one: And as, from the Defenders Conduct in the Particulars above mentioned, it was apparent, that Shifts and Delays was all they had in view, hoping the Matter would wear out of head, the Decreet in Abſence, in Terms of the Libel, was meant for no other Purpoſe but to force them to compear; and the Reſpondent appeals to the whole Proceedings, from firſt to laſt, that all he ever inſiſted upon was, for Reduction of the foreſaid erroneous ſpecial Retour, Infeftment, and Charter; and that, in conſequence of his Right of Superiority, they ſhould take the Entry from him.

The

The Defenders preferred a Repreſentation, reclaiming againſt the aforeſaid Decreet in Abſence, 23d *January* 1765, no earlier than the 22d *February*, which being adviſed by the Lord Ordinary, without appointing it to be anſwered, he pronounced the Interlocutor recited in the Petition, of Date the 8th *March* 1765, declaratory of the Reſpondent's Right of Superiority, and reducing the aforeſaid ſpecial Service and Retour of the ſaid *Francis Kennedy*, Infeftment following thereon, and Charter under the Great Seal, in favour of Baron *Mure*; but aſſoilzying from the other Concluſions of the Libel. As the Reſpondent had hitherto had no Opportunity of being heard in the Cauſe, he preferred a Repreſentation, inſiſting upon the ſeveral Grounds above mentioned, therein ſpecially ſet forth, that he ought to be allowed the Expences he had been put to, and of extracting the Decreet: To which the Petitioner, Baron *Mure* put in his Anſwers, inſiſting, that as Mr. *Francis Kennedy* was then recently dead, and had left a Son, who was entitled to take up the Lands as Heir to his Uncle, Baron *Kennedy*, he ought to be called in the Proceſs; and that the Proceſs, in the mean time, ought to ſtop, till it ſhould be regularly transferred againſt the Heir of Mr. *Francis Kennedy*:—But the Lord Ordinary, by Interlocutor 31ſt *January* 1766, found Baron *Mure* liable in Expences, and allowed an Account of them to be given in.

A ſecond Repreſentation was preferred for Baron *Mure*, reclaiming againſt the laſt mentioned Interlocutor, ſo far as it found the Expences due, and again inſiſting, that the Proceſs ſhould ſtop, till the Heir of Baron *Kennedy*, and Mr. *Francis*, were made Defenders.

However neceſſary this Transference might be in point of ſtrict Form, in order to found the Concluſion of Non-entry, and Mails and Duties, of Tinſel of the Property, in regard Baron *Mure* had not hitherto expede his own Infeftment, neither of which were ever ſeriouſly meant to be inſiſted on;

ſuch

ſuch Transference was quite unneceſſary to the Purpoſe of obtaining Declarator of the Reſpondent's Right of Superiority, as againſt Baron *Mure*, or for reducing his erroneous Charter; but in order to avoid all Objections on this Head, the Reſpondent brought a Transference againſt the Petitioner, *Francis Kennedy*, which was returned the 24th *January* laſt, with *a no* Proceſs afterwards departed from.

Upon adviſing ſaid laſt mentioned Repreſentation, with the Anſwers, the former Interlocutor was adhered to, by another Interlocutor, 17th *July* laſt, againſt which a 4th Repreſentation having been preferred, the ſame was alſo refuſed, by Interlocutor 5th *March* 1767, when the Lord Ordinary found the Defenders liable in the Expence of Proceſs, and the Expence of extracting the Decreet.

From this State of Facts, and Proceedings in the Proceſs itſelf, the Anſwers to the Petition, reclaiming againſt the Expences, will be obvious. The Reſpondent's Right of Superiority of theſe Lands, as Purchaſer upon the publick Sale of the Barons of Exchequer, was clear and unexceptionable, as any thing of the Kind could be, and the Doubt pretended to be entertained, whether the Reſpondent's Purchaſe did comprehend the Superiority, or only the Feu-duty, was moſt affected, as his Diſpoſition, Charter, and Infeftment, all upon Record, contain a clear and explicit Grant of the Superiority of theſe Lands; Baron *Kennedy*'s Charter and Infeftment, while the Right ſtood in the Crown, was proper *ſupplendo vices*, and from the Tenor of the Charter itſelf, it was apparent, that no more was thereby meant, or intended. Baron *Kennedy*, by his Agent, attended the Sale, and witneſſed the Reſpondent's being preferred as Purchaſer; Mr. *Francis Kennedy*, the Heir of the Baron, acknowledged the Reſpondent's Right, and paid him the Feu-duties for ſeveral Years, notwithſtanding of which, when he came to expede his ſpecial Service and Infeftment, he retoured theſe Land as holding of the Crown, the Impropriety of which could not

be unknown, either to him or Baron *Mure*; Baron *Mure*, notwithſtanding, expede his Charter under the Great Seal, which the Reſpondent having found fault with, the Baron confeſſed the Wrong, ſaid he was aſhamed of it, begged a Delay, and promiſed, upon his Return from *London*, to take his Entry from the Reſpondent, and after many Months Forbearance on the Part of the Reſpondent, without one Step taken on the Part of the Baron to redreſs this Wrong, he at length poſitively refuſed to give up the Charter from the Crown, or to acknowledge the Reſpondent for his Superior. And, when the Proceſs came to be inſiſted in, your Lordſhips have heard how the Defence was conducted, which has protracted this Litigation now for the Space of more than two Years and an Half. His firſt Defence was upon the Clan-act, as intitling Baron *Kennedy* to hold theſe Lands for ever *in capite* of the Crown, though the Baron himſelf had taken his Charter only *ſupplendo vices*, and tho' the Reſpondent, upon his after Purchaſe from the Barons of Exchequer, ſtood publickly infeft in that Superiority, upon his Charter under the Great Seal, and had been acknowledged as ſuch by Mr. *Francis Kennedy*'s paying ſo many Years Feu-duties to him as Superior.

The Reſpondent is willing to put the moſt favourable Conſtruction upon theſe irregular Proceedings; but as by means thereof, he was laid under the diſagreeable Neceſſity of bringing the preſent Action for aſſerting his juſt Right, had the Error or Miſtake been never ſo innocent on the Part of the Petitioners, as they have thereby brought upon the Reſpondent this unneceſſary Expence, which might juſtly have intitled him to carry his Demands much higher, he ſubmits it to your Lordſhips, whether material Juſtice and Equity does not require that he ſhould be indemnified of theſe Expences by thoſe who ſo groundleſly gave occaſion to them.

In reſpect whereof, &c.

ALEX. LOCKHART.